to the trustees,[12] the trust was held to be valid.[13] *In re Earl of Stamford and Warrington*, [1912] 1 Ch. 343. It seems an unsubstantial refinement to say that the existence of a legal term would alter the result when, if the objects for which it solely exists are destroyed, the term itself becomes a mere shell and ceases.

THE DISABILITY OF HUSBAND AND WIFE AS WITNESSES FOR AND AGAINST EACH OTHER. — 1. At common law a husband or wife cannot testify either for or against the other where one is a party to either a civil suit or a criminal prosecution. The principal reason is that such testimony would be against public policy as tending to disturb the peace of families[1] and as contrary to a natural feeling of propriety.[2] Other considerations have undoubtedly been influential in producing this doctrine, such as the unity of interest making them subject to the rule disqualifying the parties to any suit,[3] and, in the case of the disability to testify in one another's favor, the general disqualification for interest.[4] The disqualification to testify for one another is clearly an incompetency,[5] for it would be quite ineffective if it could be waived. Some cases refer to the disability to testify against one another as being the privilege of the party spouse which cannot be waived without his consent.[6] More generally, however, it has been spoken of as absolute disability. There have been strong implications that it cannot be waived by either spouse,[7] and it has been held that it cannot be waived by the party spouse.[8] This rule would seem most in accord with the public policy which is perhaps the true reason of the doctrine. In a recent English case the court, in holding that a statute[9] which permitted the witness spouse to be called in certain criminal cases without the consent of the party spouse did not make the witness compellable, seems to take the view that this disability is at any rate a privilege of the witness spouse. *Leach* v. *Director of Public Prosecutions*, 132

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[12] The lower court held that the trustees, who had been given a term in another estate, had a legal estate by implication anterior to the estate tail and that the trusts were, therefore, too remote. *In re* Earl of Stamford and Warrington, [1911] 1 Ch. 255. Although the trustees were given power to hold manorial courts and accept surrenders of leases, the Court of Appeal said that surrenders could be accepted without a legal estate, and that the power to hold manorial courts would not be allowed. *Cf.* Henderson *v.* Henderson, 113 N. Y. 1, 20 N. E. 814. And the court held that there was merely a power of entry to receive the rents, and manage the estate. This goes very far in refusing to create an estate in the trustees by implication, and leads to the inference that the court was anxious to escape the doctrine of Browne *v.* Stoughton, *supra*. To the court's query what estate could be implied, it might be answered, a term for years preceding the other limitations.

[13] *Cf.* Waring *v.* Coventry, 1 Myl. & K. 249.

[1] See Barker *v.* Dixie, Cas. *t.* Hardw. 264; Kelley *v.* Proctor, 41 N. H. 139.
[2] See Knowles *v.* People, 15 Mich. 408, 413.
[3] See 1 GREENLEAF, EVIDENCE, 16 ed., § 334.
[4] See 1 WIGMORE, EVIDENCE, § 601 (2).
[5] See 1 WIGMORE, EVIDENCE, § 604 (1).
[6] See Pedley *v.* Wellesley, 3 C. & P. 558.
[7] Davis *v.* Dinwoody, 4 T. R. 678. See Sedgwick *v.* Watkins, 1 Ves. Jr. 49.
[8] Barker *v.* Dixie, *supra*. See Clark *v.* Krause, 13 D. C. 559, 572.
[9] THE CRIMINAL EVIDENCE ACT, 1898 (61 & 62 VICT., c. 36), § 4.

L. T. J. 416 (Eng., H. L., Feb. 26, 1912). 2. In suits between third parties the fact that one spouse was interested in the event of the cause disqualified the other from testifying.[10] But the fact that the testimony of one spouse would tend to contradict or incriminate the other did not render the witness incompetent.[11] 3. The rule that confidential communications are privileged, which extends both to suits to which one spouse is a party and suits between third parties, must also be distinguished.[12] This is based on a clearly justified rule of public policy to insure, as in the case of attorney and client, the full benefit of a relation by encouraging complete confidence between the parties thereto.

These common-law rules as to testimony of husband and wife have everywhere been modified by statute. Often all privilege or incompetency except the third class is removed in civil cases.[13] Sometimes there is established a privilege of the party spouse in both civil and criminal cases.[14] Almost universally the privilege as to confidential communications is distinguished and confirmed.[15]

An exception to the rule of disability to testify against each other has always existed in cases of personal injury by one against the other,[16] and by statute is often extended to all suits between them. Necessity compelled this, since such testimony might be the only means of preventing a wife's becoming a victim to the tyranny of a brutal husband,[17] and public policy entered little into such a case.[18] Personal injury was limited very strictly at common law to actual physical injury.[19] A recent English case which holds that on an indictment against a man for living on the earnings of his wife's prostitution the wife was not a competent witness,[20] is in accord with this narrow view. *Director of Public Prosecutions* v. *Blady*, 28 T. L. R. 193 (Eng., K. B. D., Jan. 18, 1912). Those decisions, however, in which under modern statutes a "personal injury" and a "crime against the other" have been construed more liberally would seem preferable.[21]

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[10] Tiley *v.* Cowling, 1 Ld. Raym. 744; Labaree *v.* Wood, 54 Vt. 452.

[11] King *v.* Inhabitants of All Saints, 6 M. & S. 194, intimating that the witness must consent; King *v.* Inhabitants of Bathwick, 2 B. & Ad. 639; Queen *v.* Halliday, 29 L. J. M. C. 148.

[12] On theory, this privilege should belong to both parties to the communication. See People *v.* Wood, 126 N. Y. 249, 271, 27 N. E. 362, 368; Maynard *v.* Vinton, 59 Mich. 139, 152, 26 N. W. 401, 407. To the effect that it is incompetency, see Stein *v.* Bowman, 13 Pet. (U. S.) 209, 222. This privilege survives the relation when terminated by death. Doker *v.* Hasler, R. & M. 198. Or by divorce. Griffeth *v.* Griffeth, 162 Ill. 368, 44 N. E. 820.

[13] Me., Rev. Stat., 1903, c. 84, § 107.

[14] Minn., Rev. Laws, 1905, § 4660.

[15] Mass., Rev. Laws, 1902, c. 175, § 20; Mo., Ann. Stat., 1906, § 2637.

[16] 1 Bl. Comm. 443; 1 East P. C. 455; Lord Audley's Case, 3 How. St. Tr. 402 (rape); State *v.* Davis, 3 Brev. (S. C.) 3 (assault and battery); Wakefield's Case, 2 Lew. C. C. 279 (fraudulent abduction and marriage).

[17] See Bentley *v.* Cooke, 3 Dougl, 422, 424.

[18] See Soule's Case, 5 Greenl. (Me.) 407.

[19] Desertion is not a personal injury to come within the exception. Reeve *v.* Wood, 10 Cox C. C. 58. Nor is larceny by wife of husband's goods. Queen *v.* Brittleton, 12 Q. B. D. 266. Nor conspiracy by husband to charge wife with adultery. State *v.* Burlingham, 15 Me. 104.

[20] The Criminal Evidence Act, 1898, *supra*, § 4, does not provide for this exception.

[21] Adultery is a crime against the other. State *v.* Bennett, 31 Ia. 24. *Contra*, State